Case No. 14-60796

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ENTERGY MISSISSIPPI INCORPORATED, Petitioner Cross - Respondent

v.

NATIONAL LABOR RELATIONS BOARD, Respondent Cross - Petitioner

ON PETITION FOR REVIEW, AND CROSS-APPLICATION FOR ENFORCEMENT, OF DECISION AND ORDER BY THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER – CROSS RESPONDENT ENTERGY MISSISSIPPI, INC.

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ARGUMENT

I. The Board's Decision that Dispatchers Are Not Statutory Supervisors Lacks a Reasonable Basis in the Law.

A. The Board and the Union Urge this Court to Apply the Wrong Standard of Review.

The Opposition claims that this Court must give "particular deference" and not "second guess" the Board's determination that Dispatchers are not supervisors. (BB19; UB7-8.¹) In favor of its arguments, the Board cites to *NLRB v. KDFW-TV*, *Inc.*, 790 F.2d 1273 (5th Cir. 1986), and *NLRB v. Adco Elec.*, *Inc.*, 6 F.3d 1110 (5th Cir. 1993).² (BB19.) Those cases are not only factually distinct (dealing with the supervisory status of television station employees and job foremen, respectively, as opposed to the Dispatcher position over which the Board has been reversed so often), but **pre-date** this Court's subsequent decision in *Entergy Gulf States v. NLRB*, 253 F.3d 203 (5th Cir. 2001). Therein, this Court rejected the so-called traditional deference given to Board determinations (as cited in *KDFW-TV* and

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¹ EMI cites to the Board's Brief as "BB" and to the Union's Brief as "UB."

The Board also includes a "see also" reference to *Local No. 207, Int'l Ass'n of Bridge, Structural, & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 706 (1963), wherein the Supreme Court recognized that "[I]t is evident that this case presents difficult problems of definition of [supervisory] status, problems which we have held are 'precisely' of a kind most wisely entrusted **initially** to the agency charged with the day-to-day administration of the Act as a whole" (emphasis added) (subsequent citations omitted). Thus, in this decision, the Supreme Court merely recognized that the administrative agency is well suited to make the **initial** supervisory determination; the Court did not, however, elaborate as to the Supreme Court's (or any other Court's) deference to the agency's initial determination. Indeed, after the *Perko* case, this Court held that agency supervisory determinations were entitled to "little judicial deference," when the agency lacked consistent determinations. *Entergy Gulf States v. NLRB*, 253 F.3d 203 (5th Cir. 2001).

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Adco Electric) and applied "little judicial deference" because of the Board's long and well-detailed history of "vacillation" as to whether Dispatchers were supervisors. *Id.* at 210.

Moreover, contrary to the Opposition's claims, the *Entergy Gulf States* standard of review should not be disregarded because of *Oakwood* and its companion cases. The *Oakwood Trilogy* did not even discuss the applicable standard of review. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006); *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006); *Beverly Enters.-Minn., Inc. d/b/a Golden Crest Healthcare Ctr.*, 348 N.L.R.B. 727 (2006). And, even following *Oakwood*, other appellate courts have afforded little judicial deference to the Board's supervisory determinations and refused to enforce Board orders:

. . . [W]e are not obliged to stand aside and rubber-stamp [our] affirmance of administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute [T]he Board cannot ignore the relevant evidence that detracts from its findings. When [it] misconstrues or fails to consider important evidence, its conclusions are less likely to rest upon substantial evidence.

Lakeland Health Care Assocs., L.L.C. v. NLRB, 696 F.3d 1332, 1335 (11th Cir. 2012) (internal citations and quotations omitted); see also Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484, 492 (2d Cir. 1997) ("Recognizing that the NLRB earns and forfeits deferential review by its performance, . . . the Board's

manipulation of the definition of supervisor has reduced the deference that otherwise would be accorded its holdings").

The Board's manipulation of the supervisory status of Dispatchers is well documented – and continues. Following *Oakwood*, the Board abandoned its prior *Mississippi Power and Light* rationale,³ and this time argued that Dispatchers do not qualify as statutory supervisors because they do not assign or responsibly direct. *Entergy Mississippi, Inc.*, 361 N.L.R.B. No. 89 (2014); *Avista Corp.*, 357 N.L.R.B. No. 178 (2011). As evidenced by the foregoing, *Oakwood* does not amount to a "reset button" by which the lack of deference pursuant to *Entergy Gulf States* is suddenly erased.

B. The Board and the Union Also Urge this Court to Apply the Wrong Legal Framework.

The Opposition claims that this Court's decision in *Entergy Gulf States* should not be "controlling" (even though it explicitly holds that Dispatchers at EMI's sister company are statutory supervisors) because the *Oakwood Trilogy* purportedly "substantially refined and clarified" and "elaborated upon" the legal standards for determining responsible direction and independent judgment within this Circuit. (UB7-8; BB31-32.) A close reading of *Entergy Gulf States* reveals

³ Mississippi Power & Light ("MP&L") was EMI's predecessor. Even though the Union currently denies that EMI's Dispatchers assign and responsibly direct Field Employees, the Union introduced MP&L job descriptions at the 2003 EMI hearing to establish that Dispatchers' duties at MP&L and EMI were the same. (Union Ex.3(a).) Thus, this Court should conclude that EMI's Dispatchers, like those of its predecessor, assign and direct Field Employees.

the error in the Opposition's superficial argument. Though the *Oakwood Trilogy* was decided after *Entergy Gulf States*, it applies the **same standards** for responsible direction and independent judgment as those previously adopted by this Court.⁴

In *Entergy Gulf States*, this Court relied on the responsible direction standard first articulated in *NLRB v. KDFW-TV*: "To direct other workers responsibly, a supervisor must be 'answerable for the discharge of a duty or obligation' or accountable for the work of the employees he directs." *Entergy Gulf States*, 253 F.2d at 209, *quoting KDFW-TV*, 790 F.2d at 1278. Five years later, the *Oakwood* Board, relying on the same *KDFW-TV* case, decided to **adopt** the Fifth Circuit's standard for responsible direction:

The [Board] majority [in *Providence Hospital*] cited to the Fifth Circuit's interpretation, which is set forth in *NLRB v. KDFW-TV, Inc.*, as follows: "To be responsible is to be answerable for the discharge of a duty of obligation." . . . In determining whether "direction" in any particular case is responsible, the focus is on whether the alleged supervisor is "held fully accountable and responsible for the performance and work product of the employees" he directs The majority in *Providence Hospital*, however, found it unnecessary to pass on the courts' accountability definition. We have decided to adopt that definition.

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⁴ The Union also contends that *Entergy Gulf States* cannot be controlling because the Court did not consider whether Dispatchers "assigned" Field Employees. (UB16, fn.4.) As this Court is well aware, supervisory status is established if Dispatchers use independent judgment to **either** assign **or** responsibly direct field employees. 29 U.S.C. § 152(11); *see also Phelps Cmty. Med. Ctr.*, 295 N.L.R.B. 486, 489 (1989) ("The types of supervisory authority are listed in the disjunctive and authority with regard to any one is sufficient to confer supervisory status.") (subsequent citations omitted). Thus, this Court's decision in *Entergy Gulf States* still is binding regarding the Dispatchers' use of independent judgment to responsibly direct Field Employees.

Oakwood, 348 N.L.R.B. at 691 (emphasis added) (internal and subsequent citations omitted).

In spite of the Board's clear pronouncement that it "adopted" the Fifth Circuit's responsible direction standard, the Opposition alleges that the Board "expanded" (as well as "elaborated upon," "clarified," and "substantially refined") the standard from KDFW-TV and Entergy Gulf States: "In Oakwood, the Board expanded upon [the Fifth Circuit's] definition, explaining that to be accountable for the work product, not only must the putative supervisor be answerable, but 'some adverse consequence may befall [him] . . . if the tasks performed by the employee are not performed properly." (BB32, citing Oakwood, 348 N.L.R.B. at 692 (emphasis added); see also, UB18.) This so-called "adverse consequences requirement" is not new, however. In both Entergy Gulf States and KDFW-TV, this Court considered whether the putative supervisor suffered adverse consequences as a result of the performance of the employees that he directs. For example, in *Entergy Gulf States*, this Court held that Dispatchers at EMI's sister company responsibly directed Field Employees because, in part, they received adverse consequences for their crew's performance: "[Dispatchers] are accountable for the time it takes to restore power, and receive counseling if they manage situations poorly." Entergy Gulf States, 253 F.3d at 206 (emphasis added). This is the same accountability standard for responsible direction that was subsequently

adopted and urged by the Board in *Oakwood* and its companion cases. *See Croft Metals*, 348 N.L.R.B. at 719 (holding that lead persons were accountable because they suffered adverse consequences if their crews failed to meet employer production goals). Similarly, in *KDFW-TV*, this Court provided an example of responsible direction where the purported supervisor was reprimanded for the performance of others in his department. *KDFW-TV*, 790 F.2d at 1278, citing *NLRB v. Adam & Eve Cosmetics*, *Inc.*, 567 F.2d 723, 727 (7th Cir. 1977). Thus, the *Oakwood* decision did not somehow "expand" the Fifth Circuit's responsible direction standard to include an accountability element.

The Union (but not the Board) also contends that *Oakwood* modified the responsible direction standard from the Fifth Circuit's decision in *KDFW-TV* and *Entergy Gulf States* by adding a "corrective action" element – namely that direction is not responsible unless the putative supervisor has the authority to take "corrective action" towards the employees he or she directs. But, yet again, this element was part of the Fifth Circuit's responsible-direction standard from *KDFW-TV* and *Entergy Gulf States*, which was ultimately **adopted** by the Board in *Oakwood*. Specifically, in *KDFW-TV*, the Fifth Circuit considered the ability of the putative supervisors to take corrective action, noting that the putative supervisors could not reward or reprimand the employees that they directed. Based on this factor (and others), this Court ultimately found that these employees were

not supervisors. 790 F.2d at 1278. This Court further noted in *KDFW-TV* that another putative supervisor – who could not evaluate or discharge co-workers – did not satisfy the requirements for responsible direction. *Id.* And, not surprisingly, this Court in *Entergy Gulf States* ultimately found that the putative supervisors (the Dispatchers at EMI's sister company) responsibly directed other employees, noting (*inter alia*) that they took corrective action, issuing rewards or disciplining employees to some extent. 253 F.3d at 207. Thus, the *Oakwood* decision did not add a "corrective action element" to this Court's responsible direction standard.

And, finally, this Court in *Entergy Gulf States* and the Board in the *Oakwood Trilogy* also used the identical standard for determining whether an individual exercises independent judgment. In *Kentucky River*, the Supreme Court rejected the Board's rationale in *Mississippi Power & Light* in characterizing Dispatchers as bargaining-unit employees and specifically held that professional and technical judgment qualifies as independent judgment, so long as it is of the requisite degree. *NLRB v. Ky. River Cnty. Care, Inc.*, 532 U.S. 706, 721 (2001). The Supreme Court's decision in *Kentucky River* **pre-dated** both the Board's decision in *Oakwood* and this Court's decision in *Entergy Gulf States*; thus, both this Court and the Board had the opportunity to consider and apply the **same** *Kentucky River* standard for independent judgment. *See Entergy Gulf States*, 253 F.3d at 211;

Oakwood, 348 N.L.R.B. at 692-94.⁵ And, pursuant to the Supreme Court's precedent in *Kentucky River*, this Court already has held that Dispatchers at Entergy's sister company exercise independent judgment in their direction of Field Employees. *Entergy Gulf States*, 253 F.3d at 211.

Since the underlying law has not fundamentally changed, the Board cannot ignore this Court's binding precedent:

[T]he Board is not a court nor is it equal to this court in matters of statutory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court. For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law. Such an order will not be enforced.

Yellow Taxi, 721 F.2d at 382-83 (citations omitted); see also St. Margaret Mem'l Hosp. v. NLRB, 991 F. 2d 1146, 1154 (3d Cir. 1993) ("As an administrative tribunal whose findings, conclusions, and orders are subject to direct judicial review by courts of appeals, the Board is, of course, bound to follow the precedent of this [appellate] Court"). The Board's decision herein inappropriately disregards this Court's Entergy Gulf States precedent and the Supreme Court's Kentucky

Indeed, contrary to the Union's implicit claim, the Board is bound to follow the Supreme Court's *Kentucky River* decision as binding precedent, and the Board does not have the liberty of "modifying" the Supreme Court's decision. *See Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 382-83 (D.C. Cir. 1983); *see also United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO v. NLRB*, 179 F. App'x 61, 62 (D.C. Cir. 2006) (holding that the court "cannot uphold a [Board] decision that is inconsistent with controlling precedent").

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River decision. As such, it lacks a reasonable basis in the law, and the underlying Board order should not be enforced.

Finally, to be clear, EMI does not assert that any job classification – including that of Dispatcher – is per se supervisory. (BB20-21.) But the evidence in this case clearly establishes that the job duties of the Dispatchers at EMI are the same as the job duties of the Dispatchers at EMI's sister company, Entergy Gulf States. Dennis Dawsey (then EMI's Director of Distribution Operators) testified, based on his experience supervising the Distribution Dispatchers at Entergy Gulf States from 2001-2002 and his experience supervising the Distribution Dispatchers at EMI in 2006, that the 2001 job description for Dispatchers at Entergy Gulf States accurately depicts the job duties and responsibilities for Dispatchers at EMI in 2006. These duties include "responsibility and accountability for supervising and directing field personnel during service restoration and emergency conditions." (IV, 70). EMI also presented evidence that Dispatchers throughout the Entergy system are used interchangeably between subsidiaries in emergency situations, and senior managers from each Entergy subsidiary meet quarterly to ensure uniformity of operations, including uniformity of the functions provided by the Dispatcher. (IV, 70-71, 368, 428-29.) This evidence is **uncontested**. Indeed, the Opposition has failed to point to any evidence demonstrating that the Dispatchers at EMI are

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⁶ In 2006, the Board held hearings in this case for the purpose of receiving additional evidence in lights of the Board's decision in *Oakwood* and its companion cases. (V, Bd.Ex. 1b.)

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dissimilar from the Dispatchers at EMI's sister companies. Given the undisputed similarities, there is no reasonable basis in the law for treating the Dispatchers in all of Entergy's subsidiaries as supervisory, except for those Dispatchers at EMI.⁷

II. The Board's Decision that Dispatchers Are Bargaining-Unit Employees is Not Supported by Substantial Record Evidence.

The Board made the following findings in its decision: (i) Dispatchers do not use independent judgment to assign Field Employees to trouble locations; (ii) Dispatchers do not assign significant overall duties to Field Employees; (iii) Dispatchers do not assign Field Employees to a time; and, (iv) Dispatchers do not responsibly direct because they are not accountable for the actions of Field Employees. (VI, 1115-49.) As explained *supra*, these determinations are not entitled to any deference by this Court. *Entergy Gulf States*, 253 F.3d at 210. Moreover, if **any one** of the Board's underlying determinations is not supported by substantial evidence, the Dispatchers qualify as supervisors, and this Court cannot enforce the Board Orders underlying this appeal.⁸

⁷ The Board disingenuously claims that because EMI did not introduce a job description for its EMI Dispatchers at the 2003 hearing, there is no evidence that the job duties of the Dispatchers at EMI and the Dispatchers at Entergy Gulf States are functionally identical. As the Board certainly is aware, EMI did not maintain any job descriptions for employees in the bargaining unit (which EMI's Dispatchers were until they were lawfully removed by the Company in 2006). (IV, 42.) But, as noted above, there is ample **uncontested** evidence establishing that the job duties of the Entergy Gulf States and EMI Dispatchers, as well as the Dispatchers at all other Entergy subsidiaries, are functionally identical. Of course, identical job descriptions are not the only form of competent evidence to prove the similarity of position – contrary to the Board's claim.

⁸ Throughout its Brief, the Board claims that EMI failed to substantiate its assertions with

A. The Evidence Establishes that Dispatchers Use Independent Judgment to Assign Field Employees to a Place.

The Board found, and the Opposition concedes, that Dispatchers routinely assign Field Employees to a "place" in responding to trouble situations. (VII, 1925-36; *see also* BB38; UB40.) But the Opposition contends that this assignment does not involve independent judgment because Dispatchers do not evaluate Field Employees' skills. (BB38-39; UB40-41.)

First and foremost, this is not a legally sound argument. The Supreme Court has clearly rejected prior Board attempts to limit independent judgment to only certain "types" of judgments. *Ky. River*, 532 U.S. at 713-14 (holding that the Board cannot exclude all professional judgment from qualifying as independent judgment). The Board's categorical exclusion herein of certain types of judgment similarly must fail. Moreover, this argument is inaccurate. Dispatchers specifically evaluate the skills of Field Employees in determining what type of employee to send to address a particular trouble situation. (II, 1108-12.) As EMI's Resource Manager Allen East testified, the Dispatcher must initially decide whether to route a troubleman or serviceman depending on the situation. (I, 775-77 and III P.Ex. 48; *see also* John Scott's (Distribution Dispatcher Supervisor)

specific examples and instead uses so-called "string cites." (BB14, 17-18, 25, 34.) The volume of EMI's substantial record evidence (citing employee names, places, and specific actions) should not be viewed as a detriment to EMI's arguments. Given the space restrictions, EMI cannot possibly explain in detail every example and instead judiciously selected certain evidence in its Original and Reply Briefs. In the end, those string cites amount to nothing less than winning evidence.

testimony, IV, 93-95.) Thereafter, the Dispatcher must specifically decide what other classifications of employees to send based upon the specific trouble (whether a substation supervisor, a relay supervisor, a line crew, a vegetation crew, or a URD crew). In making these assignments, the Dispatcher considers the skill set of the employees, based upon their job classifications, to determine the most efficient means to restore power.

Second, and even more importantly, the Dispatcher makes numerous other judgments in assigning Field Employees to a place. To support the characterization that these assignments are "routine" and "mechanical," the Opposition relies on examples where the Dispatcher assigns the Field Employee within that geographic area to respond to the trouble. (BB38-42; UB40-45.) Of course, this "simple" situation is not common reality. And, even in the "simple" example, the Board fails to consider the Dispatchers' considerable discretion. As John Scott testified, there are innumerable judgments that Dispatchers make in deciding whether to even respond to trouble, and moreover, what response is appropriate. To illustrate these considerations, Scott utilized complex decision trees. (III, P.Exs. 48, 49.) For example, a Dispatcher first must use his judgment to decide whether to remove Field Employees from their previously assigned duties to respond to a trouble situation (or if the trouble can be handled through a routine maintenance order). (Id.) If the trouble situation requires a response, the

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Dispatcher must decide whether to immediately address the trouble and how many employees to remove from their previously assigned work activities. (*Id.*) And the Dispatcher then must decide what specific class(es) of employee(s) should be assigned to the trouble situation. (*Id.*)

Similarly, Allen East testified that even if a Dispatcher already has one troubleman assigned to an area, he still needs to make a judgment as to whether additional Field Employees are needed. (I, 776-80.) In the more "typical" situation, East testified that there are several cases of trouble at once – often because of a weather disturbance. (I, 784-86, 793-98.) Or, there may be innumerable different outage locations caused by a major power outage event, such as a hurricane, where power may be out to several hospitals, nursing homes, and major employers. In these situations, the Dispatcher initially must decide whether the same troublemen should handle all of the outage situations or whether he should call-out additional troublemen and, if so, how many. (I, 776-80; IV, 236-37, 240-42.) He also must decide the order in which to respond to the trouble situations. (Id.) Even the Union's Business Manager, Albert May, testified as to the complexity of Dispatchers' judgments in prioritizing power outages:

- Q: And do you know what enters into [the Dispatchers] decision making in those cases [where he has multiple trouble situations]?
- A: I have to have a I mean, I'd have to give a hypothetical. I am sure he uses a lot of information to make his decision from.

(II, 1111-12 (emphasis added).) In each of these scenarios, the Dispatcher uses his judgment to evaluate the amount of time needed for the repair (as well as the difficulty of the repair), the location of the outage, and the availability and location of Field Employees.

And, contrary to the Opposition's assertion, Dispatchers absolutely maintain the discretion to assign any Field Employee to any situation (and not just those Field Employees pre-assigned to a particular geographic location or pre-assigned to handle trouble situations) – even those out of network. As Duane Sistrunk (former Field Employee supervisor) explained: "[Dispatchers] could redirect my people in the event of an emergency or anywhere they needed them during the day. In other words, they could break their daily routine, their daily work, and reroute them to another part of the system, any other system, that they had any need for." Similarly, former Field Employee William McCorkle testified that (I, 193.) Dispatchers had the authority to send Field Employees outside the network. (IV, 469-70.) And though the Board claims that Dispatchers cannot deviate from preassigned geographical locations in assigning Field Employees to a place, the Board only cites to testimony involving assignment of Field Employees after hours⁹ – and not, importantly, the assignment of employees during the work day. (IV, 240-42; P.Ex 48.)

⁹ (BB40, citing I, 1226-28, 1235.)

B. The Evidence Establishes that Dispatchers Use Independent Judgment to Assign Significant Overall Duties to Field Employees.

The Opposition argues that Dispatchers' assignment of duties to Field Employees "is merely a temporary reordering of pre-assigned work involving *ad hoc* instruction to complete discrete tasks" – and, thus, not supervisory. (BB36-37.) Interestingly, in its Brief, the Board fails to cite to **any** evidence whatsoever in support of this argument.¹⁰ This absence reveals the dearth of evidence (which certainly cannot rise to the level of "substantial") in support of the Board's conclusory contentions.

Indeed, the Opposition's unsupported argument is based upon a complete mischaracterization of the record. The evidence establishes that the Dispatchers assign **new** and **previously unforeseen** duties to Field Employees during emergency or contingency situations (which, of course, do not involve "preassigned" work). For example, former Field Employee William McCorkle provided a "common" example where a Dispatcher removes a Field Employee from work previously assigned by the Operations Coordinators (hooking up a meter to a house) because of a car hitting a pole and disrupting power to several customers. As a result of this **unplanned contingency**, McCorkle testified that the Dispatcher assigns new duties to the Field Employee(s) wholly unrelated to the

¹⁰ In fact, the only record citation included in the Board's brief (other than citation to the Board's Decision and Order) is about the assignments made by another job classification, Operations Coordinators. (BB37.) These assignments are not at issue and are irrelevant to this appeal.

connecting of the meter (such as erection of the pole, execution of the switching order, and reporting about the conditions leading to the power outage). (IV, 459-62; *see also* IV, 255 (explaining that the Dispatcher "assigns the overall task to the employee").) The Dispatcher is not merely reassigning the Field Employee to what he already was assigned to do. (BB37; UB41.)

Even the execution of switching orders involves the assignment of significant overall duties by the Dispatcher to the Field Employee. McCorkle explained that the Dispatcher may assign the Field Employee to numerous locations, several miles apart, to complete the switching process. (IV, 485-88, 491.) And the Field Employee is bound to complete the steps of the switching order exactly as directed by the Dispatcher. (*Id.*)

The Board, interestingly, has found that "restocking shelves" qualifies as the assignment of a significant overall duty. *Oakwood*, 348 N.L.R.B. at 689. Surely, then, the assignment of Field Employees to unplanned trouble situations – which can consume more than half of their work day and require the performance of numerous tasks at different locations (including executing complex switching orders, repairing equipment, and reporting information) – is sufficient to confer supervisory status.¹¹ (I, 92-94; II, 1109-16; IV, 108-09, 460-63, 483-86.)

¹¹ Neither the Board nor the Union challenges EMI's unrefuted evidence establishing that Dispatchers exercise independent judgment in the assignment of significant overall duties to Field Employees.

C. <u>The Evidence Establishes that Dispatchers Use Independent Judgment to Assign Field Employees to a Time.</u>

The Board admits that Dispatchers regularly assign overtime to Field Employees. (BB34.) But the Board contends that this assignment is not supervisory because Dispatchers purportedly cannot require Field Employees to work overtime. (*Id.*)

Numerous employer witnesses, as well as Board witnesses, conclusively testified that Dispatchers have the authority to require Field Employees to work outage overtime. For example, John Scott testified that Dispatchers can require Field Employees to remain on the job after the conclusion of their shifts and work outage overtime, unless the employee has a "major critical emergency at home." (IV, 241.) Moreover, former Field Employee William McCorkle unequivocally testified that the Dispatcher "has the authority to tell [the Field Employee] to work [outage overtime]," and that the Field Employee "could be subject to discipline" for his failure to do so. (IV, 467.) And, even the Union's Business Manager, Albert May, admitted that if the Field Employee does not want to work this overtime, he has to request permission from the Dispatcher to be relieved: "It's not unusual for a serviceman or troubleman to say, I've got another commitment, that I really need to get off, and if you could get someone else to work, I would appreciate it, things of that sort." (II, 1114.)

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The Opposition "rebuts" this clear and substantial evidence with references

to irrelevant arguments and evidence. For example, the Board contends that

Dispatchers do not assign overtime to Field Employees because EMI failed to

present evidence of a "specific instance" where a Dispatcher required a Field

Employee to continue to work. But the Board fails to cite any authority in support

of its proposition that specific witness testimony (as opposed to an example of a

"specific instance") is somehow insufficient to establish Dispatchers' supervisory

status. See Lakeland, 696 F.3d at 1344 (holding that employer does not need to

give specific examples to establish employee's supervisory status). And the

Board's contention is inaccurate anyway. McCorkle unequivocally testified that a

Dispatcher **required** him to work outage overtime:

Q: But if [the Dispatcher] couldn't find anybody else, could he

have you stay on and finish the work after going past five

o'clock even up through six o'clock?

A: That's right.

Q: He could.

A: Yes.

Q: All right. So he has the authority to make you stay on and

finish that work until it's done?

A: That's right.

. . . .

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Hearing officer Dorman: Have you ever had to leave, or have you ever had a time where the dispatcher – if you had to leave, the dispatcher couldn't find anybody to take your place?

The Witness: Oh, yes. And I've stayed on and worked.

(IV, 466-67, emphasis added.)

In another irrelevant argument, the Board contends that Dispatchers do not assign overtime because if an employee refuses to work overtime, his direct supervisor (and not the Dispatcher) imposes the discipline. (BB35.) This argument is a red herring. To establish supervisory status, EMI only must prove that its Dispatchers perform any one of the twelve enumerated supervisory functions (which include assign or discipline). 29 U.S.C. § 152(11). For the purpose of determining whether Dispatchers "assign" Field Employees, it is irrelevant whether they also possess the supervisory power to "discipline" Field Employees. *Monotech of Miss. v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989).

In fact, the only evidence that the Opposition presents in support of its argument is the testimony of Dispatcher Tony DeLaughter¹² that Field Employees

¹² The Board also claims that Field Employee Glen Allen Brooks, Sr. testified that Dispatchers could not order him to work overtime. (BB36, citing II, 1493-95.) But Brooks' testimony was seemingly in the context of whether a Dispatcher could require him to work "call-out overtime," which refers to the situation where a Dispatcher (or another supervisor) contacts a Field Employee at his home off-hours and off-shift requesting that the employee work overtime. Pursuant to the terms of the parties' collective bargaining agreement, it is undisputed that Dispatchers – or any other supervisor – cannot require Field Employees to work call-out overtime. (I, 771-73; IV, 238-40.) This is irrelevant to the present analysis, however, regarding whether Dispatchers can require Field Employees to work "outage overtime," which refers to a Dispatcher requiring a Field Employee to extend his or her shift in order to respond to a trouble

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almost always work overtime at the request of the Dispatcher, but that they purportedly do not have to do so. (BB35.) In comparison to the weight of contrary testimony, this is not substantial evidence sufficient to support the Board's conclusion that EMI Dispatchers cannot require overtime. *See NLRB v. Arkema, Inc.*, 710 F.3d 308, 314 (5th Cir. 2013) ("Because the [c]ourt is not left merely to accept the Board's conclusions, the [c]ourt must be able to 'conscientiously conclude that the evidence supporting the Board's determination is substantial'") (subsequent citations omitted).

Since the Board's finding that Dispatchers do not assign overtime is not entitled to any deference and is contrary to the overwhelming weight of the record evidence, its opinion should not be enforced by this Court.¹³

D. <u>The Evidence Establishes that Dispatchers Use Independent Judgment to Responsibly Direct Field Employees.</u>

The Opposition concedes that Dispatchers direct Field Employees through switching orders and the safe and efficient restoration of power. (BB6-7; UB30.) But the Opposition claims that this direction is not "responsible" because Dispatchers are not accountable for the Field Employees that they direct. Specifically, the Opposition alleges that EMI cannot establish accountability absent evidence that Dispatchers are disciplined for the mistakes of their Field

situation.

¹³ Neither the Board nor the Union challenges EMI's evidence that Dispatchers use independent judgment in their assignment of Field Employees to a time.

Employees. (BB22-23; UB27-28.) But this contention is based upon a complete distortion of the accountability element necessary to establish responsible direction.

In Croft Metals, the Board thoroughly explained the accountability component necessary for responsible direction, relying exclusively upon the following evidence in determining that lead persons (who oversaw a crew that loaded trucks with windows and doors) were accountable for the employees that they directed: "[a lead man] was . . . warned when it took too long for two trucks to be loaded"; and lead persons were disciplined for their crew's unacceptable productivity, for the lead person's failure to correct problems as they occurred on the line, and because the crews were not busy enough. *Id.* at 719 and n.11. *There* was no record evidence whatsoever that lead persons were disciplined because of mistakes made by their crew members. The only record evidence was that lead persons were held accountable for their crew's failure to meet production goals or other shortcomings, as detailed above. And yet, based on this alone, the Board still found that lead persons were accountable – and, thus, responsibly directed – their crews. Id.

The evidence presented by EMI is no different – and clearly establishes that Dispatchers are responsible for their crew's failures in safe switching and efficient power restoration. Like the lead men in *Croft Metals* who received a verbal

warning for their crew's slower time on the production line, the Dispatchers herein were issued a collective warning when their crews' power restoration times lagged behind other networks. (IV, 157-60.) The Dispatchers were further warned that individual discipline would follow if these unacceptable power restoration times continued. (*Id*.) This evidence is unrefuted and not even addressed by the Opposition (or the Board in its decision) – and yet nothing else is required to establish accountability. Furthermore, like the lead person in Croft Metals who were warned for the failure to correct problems on the line or keep the crew busy, EMI presented evidence that a Dispatcher was disciplined for failing to properly assign enough Field Employees to a trouble spot, resulting in a lengthy power (IV, 312-15.) EMI also presented evidence that a Dispatcher was outage. disciplined for not directing additional Field Employees to work on a switching order – which then resulted in one of the Field Employees making a mistake that led to a power outage. 14 (IV, 325; see also IV, 390, wherein a Baton Rouge Dispatcher was disciplined for failing to direct her line crew properly during a restoration event.)

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The Opposition attempts to discount this evidence because the coaching was not included in the Dispatcher's personnel file. But verbal discipline is sufficient to qualify as "negative consequences" for purposes of the accountability requirement. *See Croft Metals*, 348 N.L.R.B. at 719 (noting employee disciplined when "warned" by supervisor); *Lakeland*, 696 F.3d at 1344 (evidence of actual discipline is not required to establish responsible direction, so long as there is the *prospect* of adverse consequences, even if never implemented).

The uncontradicted evidence also establishes that Dispatchers who have longer power restoration times receive less compensation. And, again, this is sufficient in and of itself to establish accountability necessary for responsible direction. The Board, citing to *Bay State Gas Co.*, 253 N.L.R.B. 539 (1980), tries to discredit this evidence because EMI purportedly ". . .unlawfully implemented [this] program while the unit clarification petition was pending." (BB30-31.) The Board provides no record citation for this alleged unlawful implementation; and, in fact, this PPR system has been in place for Entergy management (including Dispatchers at other Entergy subsidiaries) for years. (IV, 222-23.) In addition, *Bay State Gas Co.*, *supra*, is distinct and involved the elimination of a contested unit position during the pendency of a unit-clarification petition. No such abolishment occurred here. As this Court recognized in *NLRB v. Arkema*:

An employer does not automatically violate the NLRA, but merely proceeds at its own risk, when engaging in unilateral activities before decertification election's results are formally validated. Because we find no grounds for invalidating the decertification election, Arkema's reliance on the election results before their formal validation did not violate Section 8(a)(5).

710 F.3d at 320 (footnote and internal citations omitted). By the same reasoning, EMI acted at its own risk by removing the Dispatchers from the bargaining unit during the pendency of the unit-clarification decision. But the record evidence regarding the PPR compensation system can – and should – nonetheless be considered in evaluating supervisory status.

E. This Court Should Reject the Board's Decision Since It Is Not Based on the Record Evidence.

As further evidence of the Board's results-driven approach and failure to consider the record evidence, EMI offered arguments (including two appendices to its Original Brief) summarizing the Board's rulings on supervisory status pre- and post-*Oakwood*. (*See* EMI's Original Brief at pp. 26-27, Appendix A and Appendix B.) Importantly, neither the Board nor the Union in any way refutes the clear, numerical evidence offered by EMI in its Original Brief and the corresponding appendices: *no employer has won a supervisory case before the Board since* 2006.

Rather than denying the actual evidence, the Board alleges several "technical" arguments, including (amongst other things) that EMI purportedly failed to raise this issue before the Board. (BB-43.) EMI's argument that the Board has a "results-driven approach" post-*Oakwood* is not new to this litigation. To the contrary, it merely is additional evidence that EMI presented in support of its long-standing and principal argument that the Board's decision was not based on the record evidence. Indeed, this is not a new, case-dispositive argument, in contrast to the types of arguments that this Court has barred when not raised during the administrative phase of the case. *See*, *e.g.*, *NLRB* v. *Houston Bldg. Serv.*, *Inc.*, 128 F.3d 860, 863 (5th Cir. 1997) (holding that affirmative defense not raised in the administrative proceedings was waived). As such, the Court can – and should

- consider the Board's pattern of rulings post-*Oakwood*. It plays into the non-deferential standard of review that the Board deserves in this case.

The Opposition also attempts to discount EMI's appendices by alleging that it provides "only a cursory and superficial analysis of the Board's supervisory decisions." (BB44-45.) EMI in no way alleges that each and every one of the decisions cited in the Appendices is factually identical to the present matter. Indeed, the facts of those cases are irrelevant to EMI's argument. EMI only offers the Appendices as further evidence that the Board has consistently applied the *same legal standard* since 2006 to achieve a pre-ordained outcome of no supervisory status.¹⁵

III. The Defense of Laches Is Particularly Appropriate Given the Facts of this Case.

Incredibly, neither the Board nor the Union includes laches within their "Statement of Issues." (BB3; UB1-2.) This absence is particularly surprising, since this case involves an objectively lengthy delay of **eleven** years to handle an oft-litigated and by now "routine" issue for the Board concerning Dispatchers. The Board claims that this delay is "regrettable" and was "largely due to the evolving state of the law respecting the standard for determining supervisory status."

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¹⁵ Ironically, if the facts of each of the underlying cases differ so dramatically (as the Board claims), it is indeed even more remarkable that the Board has failed to rule in favor of an employer on this issue for nearly a decade.

¹⁶ The Board also rather unbelievably claims that this eleven-year delay "was not unreasonable

(BB46.) This is disingenuous, however, because the Board did not issue its opinion in this case until **almost five years** following the *Oakwood* decision. Thus, the so-called "evolving" state of the law certainly was not the only cause of the delay.

Regardless of the cause, the Opposition contends that EMI should bear the consequences of the Board's delay, citing the factually distinct and inapplicable case of NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969). In Rutter-Rex, the employer committed numerous, egregious unfair labor practices (including denying reinstatement to some 600 striking workers) and was subject to two enforcement proceedings in this appellate court. *Id.* at 259-60. In the subsequent compliance phase, the Company was ordered to "make such applicants whole for any loss of pay . . . by reason of the . . . refusal, if any, to reinstate them." *Id.* at Thereafter, the Board waited four years before issuing its back-pay 260. specification, which resulted in a substantial increase in the employer's liability. Id. at 261. This Court refused to enforce the Board's back-pay specification because of the Board's unconscionable delay, limiting the employees' back-pay awards to two years. 399 F.2d 356, 365 (5th Cir. 1968). The Supreme Court reversed. However, their holding was specifically **limited** to the Court's review of the Board's **remedial** authority. 396 U.S. at 263. And, in such a case, the Board

or deliberately dilatory." (BB46.) This contention only begs the question as to what would (in the Board's view) qualify as an "unreasonable delay" – if not a delay of more than a decade.

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undoubtedly has broad discretionary authority to allocate damages, subject to limited judicial review. *Id*.

In a representation/refusal to bargain proceeding like the one herein, however, this Court's review of the Board's Order is much broader, particularly since Board supervisory determinations are entitled to little judicial deference and questions of law are entitled to a *de novo* review. *Entergy Gulf States*, 253 F.3d at 210; *Arkema*, 710 F.3d at 320. And though the Opposition claims that EMI should bear the consequences of the Board's delay, this Court has the discretion to apply the doctrine of laches against any government agency – including the Board – if its actions were dilatory and resulted in actual prejudice to EMI. *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 373 (1977).¹⁷

Unlike the employer in the *Rutter-Rex* case, EMI did not commit egregious unfair labor practices. To the contrary, following this Court's binding precedent in *Entergy Gulf States* regarding the Dispatchers at EMI's sister company (and in light of the unanimity of the other appellate courts in Section 2(11) utility-industry dispatcher cases), EMI filed its unit-clarification petition and then waited nearly **three years** before removing Dispatchers from the Bargaining Unit. (IV, 29-33.) In doing so, EMI and the Union mutually agreed to a memorandum of understanding for the treatment of the Dispatchers thereafter. (VI, 1981-82.) And

¹⁷ Of course, it would be completely inconsistent for laches to be permitted in discrimination cases vis-à-vis the EEOC, but for laches to be barred in union cases vis-à-vis the Board.

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EMI only then decided to remove the Dispatchers because of the Company's reasonable reliance on the *Oakwood Trilogy*, wherein the Board **adopted** this Court's *Entergy Gulf States* standards for determining supervisory status. (*Id.*) EMI's actions in this case have at all times been reasonable – and quite factually and procedurally distinct from those of the employer in *Rutter-Rex*. Given the Board's indisputably unreasonable delay coupled with EMI's resulting prejudice, the defense of laches is particularly appropriate in this unique case.

CONCLUSION

This Court should deny enforcement of the Board's Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 15, 2015, a true and correct copy of this document was served via electronic means through transmission facilities from the Court upon those parties authorized to participate and access the Electronic Filing System for this Court in the above-captioned action:

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CERTIFICATE OF COMPLIANCE

- 1. This Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Court's Order of May 28, 2013 allowing EMI to file a brief in excess of the word count because:
 - this Brief contains 6,945 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).
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<u>/s/</u>	Sarah	Voorhies M	lyers

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Dated: May 15, 2015